No. 08-576

In the Supreme Court of the United States

FIN-AG, INC., PETITIONER

v.

PIPESTONE LIVESTOCK AUCTION MARKET, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BENJAMIN J. HORWICH
Assistant to the Solicitor General
MICHAEL JAY SINGER
JEFFRICA JENKINS LEE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a buyer of farm products in the ordinary course of business is entitled to the protections of the Food Security Act of 1985, 7 U.S.C. 1631(d), and thus to take purchased property free of a security interest created by the seller, where the creditor fails to include the debtor-seller's "doing business as" name on its financing statement, as required under state law.

TABLE OF CONTENTS

Page

Statement 1

Discussion 8

A. The Supreme Court of South Dakota's application of South Dakota law to the FSA's notice exception does not warrant review 9

B. The Supreme Court of South Dakota's analysis of the FSA's "created by the seller" limitation was confined to the d.b.a. scenario presented here 13

C. The Supreme Court of South Dakota's decision does not conflict with the Minnesota Supreme Court's decision in *Hufnagle* 16

D. The question presented in the petition for a writ of certiorari does not in any event merit this Court's review at this time 18

Conclusion 19

TABLE OF AUTHORITIES

Cases:

Adams v. *City Nat'l Bank & Trust Co.*, 565 P.2d 26 (Okla. 1977) 7

Atlantic Cleaners & Dryers, Inc. v. *United States*, 286 U.S. 427 (1932) 15

C&J Leasing II Ltd. P'ship v. *Swanson*, 439 N.W.2d 210 (Iowa 1989) 7

Environmental Defense v. *Duke Energy Corp.*, 549 U.S. 561 (2007) 15

Fin-Ag, Inc. v. *Hufnagle, Inc.*, 700 N.W.2d 510 (Minn. Ct. App. 2005), aff'd, 720 N.W.2d 579 (Minn. 2006) ... 17

Cases—Continued: Page

First Bank of N.D. (N.A.) v. *Pillsbury Co.*, 801 F.2d 1036 (8th Cir. 1986) 7
Jones v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) 13
Leavitt v. *Jane L.*, 518 U.S. 137 (1996) 11
NASA v. *FLRA*, 527 U.S. 229 (1999) 14
Peoples Bank v. *Bryan Bros. Cattle Co.*, 504 F.3d 549 (5th Cir. 2007) 12

Statutes, regulations and rule:

Food Security Act of 1985, 7 U.S.C. 1631 1
7 U.S.C. 1631(a)(1) 2
7 U.S.C. 1631(a)(2) 2
7 U.S.C. 1631(a)(3) 2
7 U.S.C. 1631(a)(4) 2
7 U.S.C. 1631(b) 2
7 U.S.C. 1631(c) 13
7 U.S.C. 1631(c)(2) 2
7 U.S.C. 1631(c)(2)(C)(ii)(I) 11
7 U.S.C. 1631(c)(2)(C)(ii)(II) 11
7 U.S.C. 1631(c)(3) 16
7 U.S.C. 1631(c)(4) 9
7 U.S.C. 1631(c)(4)(C) 9
7 U.S.C. 1631(c)(8) 16
7 U.S.C. 1631(c)(10) 4
7 U.S.C. 1631(d) 15, 9, 13, 16
7 U.S.C. 1631(e) 15

Statutes, regulations and rule—Continued: Page

7 U.S.C. 1631(e)(3) 2, 9, 13
7 U.S.C. 1631(g)(2)(D) 2
7 U.S.C. 1631(i) 2
9 C.F.R.:
Pt. 205 2
Section 205.103(a) 9
Section 205.103(b) 10
Section 205.202(a) 10
S.D. Admin. R. 5:04:04:20(4) (2009) <http://legis.state.sd.us/rules/DisplayRule.aspx?Rule=05:04:04:20> 4, 9, 10

Miscellaneous:

H.R. Rep. No. 271, 99th Cong., 1st Sess. Pt. I (1985) 10, 14
Secretary of State, *Mississippi UCC-1F, Farm Product Filing Financing Statement* (2001) <http://www.sos.state.ms.us/ forms/uccra9/MS-UCC1F.pdf> 12
4 James J. White & Robert S. Summers, *Uniform Commercial Code* (4th ed. 1995) 12
Uniform Commercial Code:
§ 9-307 (1978) 7
§ 9-320 (2006) 7
§ 9-503(b) (2006) 12
§ 9-503(c) (2006) 12
§ 9-503 cmt. 2 (2006) 12
§ 9-507(c) (2006) 11

In the Supreme Court of the United States

No. 08-576

FIN-AG, INC., PETITIONER

v.

PIPESTONE LIVESTOCK AUCTION MARKET, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Food Security Act of 1985 (FSA), 7 U.S.C. 1631, protects a purchaser of farm products from liability to the seller's secured party. The FSA provides that "a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest." 7 U.S.C. 1631(d). The provision was prompted by congressional findings that some state laws permitted a secured lender to enforce liens against a purchaser of farm products even if the purchaser was unaware that the sale of the product violated the lender's se-

curity interest in the product, lacked any practical method for discovering the existence of the security interest, and had no reasonable means to ensure that the seller used the sales proceeds to repay the lender. 7 U.S.C. 1631(a)(1). Such laws exposed the purchaser of farm products "to double payment for the products, once at the time of purchase, and again when the seller fails to repay the lender." 7 U.S.C. 1631(a)(2). Concluding that "the exposure of purchasers of farm products to double payment inhibits free competition in the market for farm products" and "constitutes a burden on and an obstruction to interstate commerce in farm products," Congress enacted Section 1631 "to remove such burden on and obstruction to interstate commerce in farm products." 7 U.S.C. 1631(a)(3), (4) and (b).

The protection afforded by the FSA to a buyer is qualified by a notice exception in certain circumstances. As relevant here, "in the case of a farm product produced in a State that has established a central filing system," a buyer (or a commission merchant, or a selling agent who sells a farm product for others) who registers with that State's filing system takes "subject to a security interest created by the seller" if the buyer receives written notice under that system that both the seller and the collateral are subject to an effective financing statement (EFS). 7 U.S.C. 1631(e)(3) and (g)(2)(D). Pursuant to the authority granted under the FSA, the United States Department of Agriculture (USDA) has promulgated regulations to aid States in complying with the statute's requirements for establishing and maintaining central filing systems. 7 U.S.C. 1631(c)(2) and (i); 9 C.F.R. Pt. 205. Nineteen States, including South Dakota, have been certified by USDA as meeting the requirements of the FSA and USDA's regulations.

2. Petitioner, an agricultural lender, brought suit against respondent in state court for conversion.[1] Petitioner alleged that it had a perfected security interest in cattle sold to respondent by "C&M Dairy," a name under which two of petitioner's debtors, Calvin and Michael Berwald, did business (usually referred to as a "doing business as" name, or a "d.b.a.").[2] Petitioner alleged that respondent was liable for conversion because the Berwalds and the cattle were listed on an EFS that petitioner had filed in South Dakota's central filing system, but respondent did not remit the proceeds to petitioner, or list petitioner as a co-payee on the proceeds checks. Pet. App. A5-A6 & n.7.

On cross-motions for summary judgment, the South Dakota circuit court held that respondent took free of petitioner's security interest. The court reasoned that C&M Dairy was the seller for purposes of notice under the FSA, and, because C&M Dairy was not listed as petitioner's debtor in the central filing system, respondent did not receive written notice of petitioner's security interest, and therefore took the cattle free of that interest. Pet. App. A7.

---

[1] Petitioner brought similar actions against commission merchants who sold the same debtors' cattle. The rulings challenged by the petitioner are three decisions of the Supreme Court of South Dakota handed down on the same day. See Pet. App. A2-A47; *id.* at A48-A60; *id.* at A61-A112. In each case, the state supreme court ruled against petitioner. Because of the similarity of the issues and virtually identical transactions in all the cases, the discussion in this brief focuses only on the facts of, and the court's analysis in, the lead case, *Fin-Ag, Inc.* v. *Cimpl's, Inc.* See *id.* at A2-A47. Likewise, references to "respondent" are to Cimpl's, Inc., the defendant in that case.

[2] Petitioner's security agreement listed the Berwald Brothers (a general partnership with Calvin and Michael Berwald as general partners), Calvin Berwald, Michael Berwald, Kimberly Berwald, and Sokota Dairy, LLC (collectively, the Berwalds). Pet. App. A2-A3 & n.1.

3. The Supreme Court of South Dakota affirmed in a divided decision. Pet. App. A2-A47. The majority held that under the circumstances of this case, respondent took the cattle sold by C&M Dairy free of petitioner's security interest, and that respondent therefore was not liable for conversion. *Id.* at A34.

a. The court first determined that C&M Dairy—not the Berwalds—was the "seller" for purposes of the exception to the FSA's general rule protecting the buyer against a security interest in the purchased farm products. Pet. App. A22. As an initial matter, the court rejected petitioner's argument that C&M Dairy could not be a seller because it was not a "person," explaining that the FSA defines "person" to include an individual, partnership, corporation, trust, "or *any other business entity*." *Id.* at A15 (quoting 7 U.S.C. 1631(c)(10)). The court noted that the "Berwalds did significant business buying and selling cattle under their business d.b.a. C&M Dairy," and South Dakota law does not require that business entities "register, incorporate, or comply with formal statutory procedures to exist and transact business." *Id.* at A16.

Next the court considered "whether [the Berwalds'] business d.b.a. is a seller under the FSA." Pet. App. A19. The court was persuaded that C&M Dairy, the d.b.a. under which the Berwalds did business, was the seller under the FSA because the "South Dakota Administrative Rules implementing the FSA central filing system provide that the 'use of doing business as is considered an additional debtor and shall be listed as such.'" *Id.* at A19-A20 (quoting S.D. Admin. R. 5:04:04:20(4) (2009) <http://legis.state.sd.us/rules/DisplayRule.aspx?Rule=05:04:04:20>). Thus, "no matter what the precise legal status of the d.b.a. C&M Dairy, it was considered an additional debtor that required a separate listing for the purpose of giving notice under the

FSA." *Id.* at A20. Accordingly, the court concluded that "because C&M Dairy was the only seller identified in each sale, [petitioner's] failure to include C&M Dairy on its EFS disqualified [petitioner] from invoking the written notice exception to FSA protection under 7 U.S.C. § 1631(e)(3)." *Id.* at A22.

The court rejected petitioner's argument that even assuming C&M Dairy was the "seller" for purposes of the FSA's notice exception, it was the Berwalds, not C&M Dairy, that created the security interest, and therefore the security interest did not fall within Section 1631(d)'s reference to a "security interest created by the seller." The court rejected that line of reasoning because the "Berwalds and C&M Dairy were not separate corporations. C&M Dairy was the d.b.a. for Calvin and Michael Berwald, and C&M Dairy was the name under which [the] Berwalds conducted their cattle business." Pet. App. A31. The court concluded: "Because C&M Dairy was the alter ego of the Berwalds, and because [the] Berwalds created the security interest, C&M Dairy must be regarded as the seller who created the security interest." *Ibid.*

b. The Supreme Court of South Dakota acknowledged (Pet. App. A22-A28) that its interpretation of the phrase "security interest created by the seller," 7 U.S.C. 1631(d), as used in the FSA appeared to be in tension with the Minnesota Supreme Court's interpretation of the same language in its decision in an earlier suit brought by petitioner. See *Fin-Ag, Inc.* v. *Hufnagle, Inc.*, 720 N.W.2d 579 (Minn. 2006) (reproduced at Pet. App. A113-A134). The court reasoned, however, that the particular d.b.a. situation it confronted was different from the "fronting situation" in *Hufnagle*. See Pet. App. A23-A25. In the South Dakota court's view, a "fronting" sale occurs "where a seller of farm products that are subject to a security interest has a third party

sell them under the third party's name." *Id.* at A122. The *Hufnagle* court concluded that "[t]he inclusion of the 'created by the seller' clause in [S]ection 1631 means that the statute does not provide protection for buyers in a fronting situation where the security interest from which protection is sought was not created by the fronting parties." *Id.* at A125.

In distinguishing *Hufnagle*, the Supreme Court of South Dakota noted that the summary judgment record in *Hufnagle* did not fully explain how the fronting relationship came about, so the Minnesota court was left to posit several possible scenarios. Pet. App. A23; see *id.* at A120-A123. The South Dakota court stated that although *Hufnagle* concluded that under any of three possible scenarios, the fronting persons "could not be sellers of the debtor's property and simultaneous[ly] creators of the debtor's security interest, * * * *Hufnagle* did not * * * consider the fourth factual scenario that is before this Court, i.e., debtors who created the security interest, and conducted their business under their d.b.a. business name." *Id.* at A23. The South Dakota court noted that unlike in *Hufnagle*, the "Berwalds created the security interest, but did not transfer the collateral to a distinct, real person for a later sale." *Ibid.* Rather, the court continued, the Berwalds "utilized their d.b.a. to sell the cattle themselves. Therefore, for purposes of the created by the seller limitation, [the] Berwalds cannot be separated from the acts of their d.b.a. C&M Dairy." *Ibid.*

The Supreme Court of South Dakota concluded that *Hufnagle* was further distinguishable because there appeared to be collusion between the parties in that case. The court explained that "*Hufnagle* involved a buyer that apparently knew of the lien and appeared to be a participant in the scheme to defraud the creditor." Pet. App. A24-A25.

In contrast here, the court noted, petitioner "concede[d] there was no collusion, and [respondent] neither knew of the lien nor was a participant in the scheme to defraud [petitioner]." *Id.* at A25.

c. The Supreme Court of South Dakota found support for its ruling in cases "that have considered the created by the seller limitation in factual contexts more akin to the d.b.a. seller." Pet. App. A27. See *First Bank of N.D. (N.A.)* v. *Pillsbury Co.*, 801 F.2d 1036 (8th Cir. 1986); *C&J Leasing II Ltd. P'ship* v. *Swanson*, 439 N.W.2d 210 (Iowa 1989); *Adams* v. *City Nat'l Bank & Trust Co.*, 565 P.2d 26 (Okla. 1977) (per curiam). The court noted that the courts in those cases, in interpreting former Uniform Commercial Code § 9-307 (1978) (now U.C.C. § 9-320 (2006)), from which the "created by the seller" language was adapted, "declined to strictly construe the created by the seller limitation" where the lien creator and the immediate seller were separate but closely related entities. Pet. App. A28. The Supreme Court of South Dakota concluded that while "the created by the seller limitation was generally designed to insure compliance by a retailer under an agreement with his inventory financer not to sell without [the] financer's permission[,] * * * [i]t is illogical to believe that the * * * drafte[rs] * * * anticipated a buyer would not be protected from misrepresentation by [a creator of a security interest] who had manipulated [the collateral] for his own benefit." *Id.* at A31 (last two brackets in original) (internal quotation marks omitted).

Accordingly, the Supreme Court of South Dakota held that "as the alter ego of [the] Berwalds, C&M Dairy should be regarded as the seller who created the security interest within the meaning of 7 U.S.C. § 1631(d)." Pet. App. A34. Further, the court concluded, because C&M Dairy was the only seller identified at sale, but was not identified on the

financing statement petitioner had filed with South Dakota's central filing system, respondent did not have written notice of the security interest under Section 1631(e)(3). Hence, the majority held that respondent took the cattle sold by C&M Dairy free of petitioner's security interest and was not liable for conversion.

d. Justice Sabers, joined by Justice Konenkamp, dissented. Pet. App. A36-A47. The dissent opined that the "rationale and holding set forth [by the Minnesota Supreme Court] in *Hufnagle* should be the law of South Dakota." *Id.* at A46.

DISCUSSION

The Supreme Court of South Dakota held that because petitioner did not adequately identify its debtor's d.b.a. name—C&M Dairy—on the financing statement it filed in the State's central filing system, as required by South Dakota law, respondent was protected under the FSA and took the cattle sold by C&M Dairy free of petitioner's security interest. That ruling, which largely turned on the court's application of an apparently unique South Dakota regulation, does not merit review by this Court. The Supreme Court of South Dakota's ruling does not present a square conflict with the decision of the Minnesota Supreme Court, because the latter court applied the FSA in the distinct situation involving a "fronting" sale. Moreover, USDA, in its capacities as a secured agricultural lender and guarantor of secured loans, has not found the d.b.a. sale situation at issue in this case to present significant practical problems at the present time. Accordingly, the Court should deny the petition for a writ of certiorari.

A. The Supreme Court Of South Dakota's Application Of South Dakota Law To The FSA's Notice Exception Does Not Warrant Review

The Supreme Court of South Dakota's analysis of the dispute in this case turned in large measure on the adequacy of the financing statements that petitioner filed in South Dakota's central filing system. In concluding that respondent took the cattle sold by C&M Dairy free of petitioner's security interest, the Supreme Court of South Dakota held that petitioner failed to comply with "the applicable rules for the South Dakota central filing system," which require a secured party to list a debtor's use of a "doing business as" name on its EFS. Pet. App. A19-A20 (citing S.D. Admin. R. 5:04:04:20(4)); see *id.* at A22, A32. Those South Dakota rules are, in turn, consistent with the FSA.

As discussed above, in the case of farm products produced in a State that has established a central filing system for financing statements, the FSA provides that a buyer in the ordinary course of business takes free of a seller-created security interest, 7 U.S.C. 1631(d), unless the buyer has received written notice that "specifies both the seller and the farm product being sold by such seller as being subject to an effective financing statement or notice." 7 U.S.C. 1631(e)(3). The FSA and USDA's regulations set forth the minimum information required for an EFS. 7 U.S.C. 1631(c)(4); 9 C.F.R. 205.103(a).[3] But USDA's regu-

---

[3] The minimum information required includes, *inter alia*, the crop year, the farm product name, the name of each county or parish in the State where the farm product is produced, the "[n]ame and address of each person subjecting the farm product to the security interest, whether or not a debtor," the social security number, taxpayer identification number, or other approved unique identifier of each such person, and the name and address of the secured party. 9 C.F.R. 205.103(a); see 7 U.S.C. 1631(c)(4)(C).

lations also provide that the "requirement of additional information on an EFS is discretionary with the State." 9 C.F.R. 205.103(b); see 9 C.F.R. 205.202(a) (stating that an EFS need not be the same as a financing statement or security agreement under the UCC, and noting that the FSA was not intended "to preempt basic state-law rules on the creation, perfection, or priority of security interests") (quoting H.R. Rep. No. 271, 99th Cong. 1st Sess. Pt. I, at 110 (1985) (*House Report*)). Whatever the limits of that discretion are, a State acts within those limits in providing how the debtor's name is to be specified on the EFS.

Thus, South Dakota had the authority to require filers of FSA financing statements to include d.b.a. names on their filings as a prerequisite to providing effective protection of their security interests against purchasers of farm products who know only of a debtor's d.b.a. name.[4] And as the Supreme Court of South Dakota held, the State has in fact exercised that authority in S.D. Admin. R. 5:04:04:20(4). Pet. App. A20 & n.12. As the state supreme court explained:

> [U]nder the FSA, a buyer of farm products in this situation becomes subject to a security interest only if the *secured party* complies with the notice exception in 7 U.S.C. § 1631(e). * * * Therefore, [respondent] had no duty to investigate the legal status of C&M Dairy and resulting ownership of the cattle: it was [petitioner's] duty to follow the [South Dakota] Secretary of State's

---

[4] Indeed, in this case, the state supreme court cited evidence that Calvin and Michael Berwald had conducted business for the purchase and resale of cattle under the business name C&M Dairy since 1995 and that C&M Dairy was the only name known to respondent. Pet. App. A18.

> FSA regulations and list the d.b.a. "C&M Dairy" as an additional debtor.

Id. at A21. Review of that state law issue by this Court is not warranted. See, *e.g.*, *Leavitt* v. *Jane L.*, 518 U.S. 137 (1996) (Court does not normally grant a writ of certiorari to decide questions of state law).[5]

Moreover, the state administrative rule requiring that a d.b.a. be listed in an EFS filed in the central filing system is apparently unique to South Dakota. Although the FSA itself contemplates that a master list of EFS's compiled by a Secretary of State may include "debtors doing business other than as individuals," 7 U.S.C. 1631(e)(2)(C)(ii)(I) and (II), that remains within a State's discretion. USDA has informed this Office that, based on USDA's research and informal telephone poll of the States with central filing systems, it appears that South Dakota is the only State with a central filing system that requires the listing of d.b.a.'s—

---

[5] Petitioner disagrees with respondents' contention that the state court's decision was based on Fin-Ag's failure to include C&M Dairy as an additional debtor. Reply Br. 1-3 (quoting Pet. App. A89 n.17). The passage in the state supreme court decision on which petitioner relies, however, addressed an entirely different matter: a separate set of sales as to which the Supreme Court of South Dakota had already held the FSA did not afford the commission merchants protection. See Pet. App. A76, A78, A79, A83, A89 n.17. As to those sales, certain respondents contended that petitioner failed to amend its filing statement with material changes, see U.C.C. § 9-507(c) (2006), but the state supreme court found a disputed issue of material fact on that issue. Pet. App. A89 n.17. The potential legal effect of petitioner's asserted "failure to amend its financing statement," *ibid.*, is thus distinct from the consequences of petitioner failing in its "duty to * * * list the d.b.a. 'C&M Dairy' as an additional debtor," *id.* at A21. The passage petitioner quotes in reply simply does not address the question presented, aside from suggesting that the South Dakota rule implementing the FSA that requires listing of a d.b.a. on an EFS is less forgiving than the UCC's rules requiring amendments to reflect certain material changes.

and indeed, most such States explicitly discourage the listing of d.b.a.'s by adopting the standard instructions for U.C.C. Form 1F.[6] For this reason as well, the resolution of the notice issue by the Supreme Court of South Dakota does not warrant review by this Court.[7]

---

[6] See, *e.g.*, Secretary of State, *Mississippi UCC-1F, Farm Product Filing Financing Statement* 3 para. 1b (2001) ("Don't use Debtor's trade name, DBA, AKA, FKA, Division name, etc, in place of or combined with Debtor's legal name; you may add such other names as additional Debtors if you wish (but this is neither required nor recommended).") <http://www.sos.state.ms.us/forms/uccra9/MS-UCC1F.pdf>; see also *Peoples Bank* v. *Bryan Bros. Cattle Co.*, 504 F.3d 549, 555-556 (5th Cir. 2007) (applying Mississippi law in concluding that the filer of an EFS for FSA purposes is not required to include the trade name of a Mississippi debtor; the actual name of the debtor is both necessary and sufficient under Mississippi law).

Notably, the current UCC—which generally would govern security interests in goods other than FSA-covered farm products—also discourages the use of d.b.a.'s on financing statements. Under the current UCC (and under some, though not all, cases interpreting a predecessor provision), a debtor's trade name is neither necessary nor sufficient to make a financing statement legally effective. U.C.C. § 9-503(b) and (c) (2006); *id.* cmt. 2; 4 James J. White & Robert S. Summers, *Uniform Commercial Code* § 31-18(b), at 206 (4th ed. 1995) (opining that the predecessor to Section 9-503(b) and (c) permitted individuals and partnerships "to file properly solely under a trade name" in certain circumstances, but noting disagreement among courts).

[7] The Supreme Court of South Dakota also rejected petitioner's suggestion that it adopt a "'know your seller' rule" that would "place the burden of the debtors' fraud on the buyer," by requiring the purchaser to check records other than the master list under the State's central filing system. Pet. App. A20-21 & n.13. In rejecting that contention, the court noted not only that the FSA was designed to relieve a buyer of such an obligation, but also that it was petitioner's duty to follow the State's FSA regulations by listing the "C&M Dairy" d.b.a. name in its EFS. *Id.* at A21. The court's rejection of the proposed "know your seller" rule thus also rested in large part on the particular South Dakota regulation.

B. The Supreme Court Of South Dakota's Analysis Of The FSA's "Created By The Seller" Limitation Was Confined To The D.B.A. Scenario Presented Here

After concluding that respondent did not receive adequate notice of petitioner's security interest under 7 U.S.C. 1631(e)(3) and the South Dakota administrative rule, the state supreme court next addressed "whether [respondent's] FSA protection was eliminated by the 'created by the seller' limitation in 7 U.S.C. § 1631(d)." Pet. App. A22. Section 1631 provides:

> (d) Purchases free of security interest
>
> Except as provided in subsection (e) of this section [describing purchases subject to security interest] and notwithstanding any other provision of Federal, State, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest *created by the seller*, even though the security interest is perfected; and the buyer knows of the existence of such interest.

7 U.S.C. 1631(d) (emphasis added). In construing that provision, the state supreme court noted that the term "seller" is not defined in the FSA. Pet. App. A15; see 7 U.S.C. 1631(c) ("Definitions"). The court therefore reasoned that it was necessary to look to the FSA's legislative history and purpose to determine the term's meaning. Pet. App. A15 (citing *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377 (2004); *Garcia* v. *DHS*, 437 F.3d 1322, 1350 (Fed. Cir. 2006)).

Looking to legislative intent, the state supreme court explained that in preempting provisions of state law that prevented buyers in the ordinary course of business from taking free of agricultural lenders' security interests, Con-

gress sought to prevent innocent buyers of farm products from becoming "unwilling loan guarantors, in essence assuming the credit supervision responsibilities that rightly belong with the lender who is making the profit off the loan to begin with." Pet. App. A26 (quoting *House Report* 109). The court also noted that "with respect to notice, Congress specifically intended to preempt state laws that require buyers to 'check public records, obtain no-lien certificates from the farm products sellers, or otherwise seek out the lender and account to that lender for the sale proceeds.'" *Id.* at at A26-A27 (quoting *House Report* 110).

The state supreme court thus concluded:

> In light of this express intent, * * * with respect to the created by the seller limitation, we believe it is unreasonable to conclude Congress intended that buyers, acting in the ordinary course of business, would not be protected by the FSA from debtors who created a security interest in collateral and subsequently utilized their business d.b.a. in selling the collateral.

Pet. App. A27. Petitioner argues that that result cannot be correct because it assigns two different meanings to the term "seller" within two subsections of the FSA. Pet. 10.

Petitioner is correct that the state court's application of the term "seller" in the "created by the seller" limitation was not entirely congruent with its analysis of the "seller" in the notice exception. See Pet. App. A13-A14; A26, A32-A33. But that aspect of the state court's decision does not warrant review, especially given the particular circumstances of this case.

It is a well settled canon of statutory construction that a statutory phrase "should ordinarily retain the same meaning wherever used in the same statute." *NASA* v. *FLRA*, 527 U.S. 229, 235 (1999). But that principle of statu-

tory construction is not rigid. *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007). Indeed, this Court "understand[s] that '[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Ibid.* (quoting *Atlantic Cleaners & Dryers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)). Further, "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Environmental Def.*, 549 U.S. at 574.

Those precepts are relevant in this case, where the "created by the seller" limitation and the notice exception operate in two different contexts, each having a distinct focus. See Pet. App. A32. The "created by the seller" limitation looks toward the lender/debtor relationship to define the class of security interests that are not protected under Section 1631(d), while the notice exception looks toward the vendor/buyer relationship to specify the particular security interests of which Section 1631(e) charges the buyer with knowledge. While the vendor-debtor may ordinarily be known to both its buyer and its lender by the same name, this is not necessarily true when the vendor uses a d.b.a. trade name. The state supreme court's decision respects that practice of doing business using a trade name (which, significantly, the state court found was the Berwalds' ordinary practice, *id.* at A17-A18) by interpreting "seller" in light of its context. Moreover, South Dakota's unique regulatory requirement that a d.b.a. be listed on an EFS supports the court's result in this case, because one apparent purpose of listing a d.b.a. on an EFS would be to preserve a security interest under Section 1631(e) that in the absence

of such a listing would lose protection under Section 1631(d).

The Supreme Court of South Dakota's decision in the d.b.a. context therefore presents no issue of general importance warranting this Court's review at the present time.

C. The Supreme Court Of South Dakota's Decision Does Not Conflict With The Minnesota Supreme Court's Decision In *Hufnagle*

Contrary to petitioner's contention (Pet. 11, 20), there is no direct conflict between the Supreme Court of South Dakota's decision and that of the Minnesota Supreme Court in *Hufnagle*. In *Hufnagle*, the Minnesota Supreme Court held that a buyer of farm products in a "fronting" situation was not entitled to the protection of 7 U.S.C. 1631(d) and thus was liable to the secured lender for conversion of the sale proceeds. There, a farmer (Buck) used his employees and minor children (collectively, the Tookers) as third-party "fronts" to sell corn that was subject to a security interest Buck had created. The proceeds were deposited into Buck's bank account, but Buck never applied the proceeds toward his debt. See Pet. App. A120-A121 & n.5.

In concluding that the buyer could not claim the protection of the FSA, the *Hufnagle* court posited three ways in which the fronting relationship could have been created (a necessary exercise because the summary judgment record before it was thin). The court explained that the Tookers could have been involved (1) as agents selling on behalf of Buck, the undisclosed principal; (2) as "commission merchants" or "selling agents," under 7 U.S.C. 1631(c)(3) and (8); or (3) as owners of the corn, selling on their own behalf. Pet. App. A122. Based upon those assumed facts and its reading of the FSA, the *Hufnagle* court reasoned that "the 'created by the seller' clause in [S]ection 1631 means that the statute does not provide protection for buyers in a

fronting situation where the security interest from which protection is sought was not created by the fronting parties." *Id.* at A125.

Hufnagle addressed a fact pattern distinct from the one in this case. Unlike the debtor in *Hufnagle*, the debtors here created the security interest but did not transfer the collateral to another party to sell at a later time. Rather, the debtors sold the cattle under their own d.b.a. name, which the Supreme Court of South Dakota held was the Berwalds' alter ego. See Pet. App. A23 ("[F]or purposes of the created by the seller limitation, [the] Berwalds cannot be separated from the acts of their d.b.a. C&M Dairy."). Indeed, the South Dakota court found *Hufnagle* distinguishable on exactly that basis, explaining that the instant case "is far different than *Hufnagle* where separate and distinct sellers sold the collateral without having any business relationship or interest in the debtor's business." *Id.* at A24.

The Supreme Court of South Dakota also found *Hufnagle* factually distinguishable on the ground that the extensive prior sales relationship between the owner of the corn and the buyer in that case suggested collusion between the parties. Pet. App. A24; see *Fin Ag., Inc.* v. *Hufnagle, Inc.*, 700 N.W.2d 510, 518 (Minn. Ct. App. 2005), aff'd, 720 N.W.2d 579 (Minn. 2006). In contrast, petitioner here concedes that there was no collusion and that respondent was not part of any scheme to defraud petitioner. Pet. App. A25.

Thus, the decisions of the South Dakota and Minnesota Supreme Courts do not present a conflict warranting review by this Court. Accordingly, there is no present need for this Court to "authoritatively clarify the interpretation and application of the FSA." Pet. 20.

D. The Question Presented In The Petition For A Writ Of Certiorari Does Not In Any Event Merit This Court's Review At This Time

As petitioner acknowledges (Pet. 5), there has been a "relative lack of litigation" involving the FSA provisions since the statute's enactment in 1985. See Pet. App. A46 (Sabers, J., dissenting) ("There is a scarcity of authority on this issue."). Through the Farm Service Agency and the Commodity Credit Corporation, among other agencies, USDA administers a variety of secured direct-lending programs and loan-guarantee programs for private secured loans. Despite the considerable size of those programs and the passage of nearly a quarter century since enactment of the FSA, USDA has informed this Office that it so far has experienced few if any of the "fronting" problems addressed in *Hufnagle* or the d.b.a. issues raised in these cases. The decision of the Supreme Court of South Dakota therefore does not raise issues of broad practical importance that warrant review by this Court at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BENJAMIN J. HORWICH
Assistant to the Solicitor General
MICHAEL JAY SINGER
JEFFRICA JENKINS LEE
Attorneys

MAY 2009